

Wally Electrical Supply Company and Wally Electrical Supply Company, Debtor in Possession and International Brotherhood of Electrical Workers, Local No. 5, AFL-CIO. Case 6-CA-16731

7 June 1984

ORDER DENYING MOTION

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND DENNIS**

Upon a charge and two amended charges filed by the Union 16 September 1983,¹ 14 October, and 31 October, respectively, the Regional Director for Region 6 of the National Labor Relations Board issued a complaint and notice of hearing 31 October against Wally Electrical Supply Company and Wally Electrical Supply, Debtor in Possession, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. Although properly served copies of the charge, amended charges, and complaint, the Respondent has failed to file an answer to the complaint. By letter dated 17 November the Regional Attorney informed the Respondent that unless it filed an answer to the complaint immediately, a Motion for Summary Judgment would be filed with the Board. The Respondent filed no answer.

On 6 February 1984 the General Counsel filed a Motion for Summary Judgment. On 8 February 1984 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response.

Ruling on Motion for Summary Judgment

The complaint alleges that about 9 September the Respondent violated Section 8(a)(5) and (1) of the Act by laying off bargaining unit employees and failing to make contractually required payments to various funds, including health and welfare and pension funds, without prior notice to the Union and without having afforded the Union an opportunity to bargain with respect to such acts and the effects of such acts.

On 22 February 1984 the United States Supreme Court decided *NLRB v. Bildisco & Bildisco*, 115 LRRM 2805, 100 LC ¶ 10,771 (1984). The Court held that the Bankruptcy Court should permit rejection of a collective-bargaining agreement if the debtor-in-possession in Chapter 11 proceedings can show that the agreement burdens the estate and that the equities balance in favor of rejection. The Court also held that a debtor-in-possession does not commit an unfair labor practice when it unilaterally

rejects or modifies a collective-bargaining agreement before the Bankruptcy Court approves formal rejection. In connection with this second holding, the Court stated, in pertinent part:

[T]he Board is precluded from, in effect, enforcing the contract terms of the collective-bargaining agreement by filing unfair labor practices against the debtor-in-possession for violating § 8(d) of the NLRA. Though the Board's action is nominally one to enforce § 8(d) of the Act, the practical effect of the enforcement action would be to require adherence to the terms of the collective-bargaining agreement. But the filing of the petition in bankruptcy means that the collective-bargaining agreement is no longer immediately enforceable, and may never be enforceable again. Consequently, Board enforcement of a claimed violation of § 8(d) under these circumstances would run directly counter to the express provisions of the Bankruptcy Code and to the Code's overall effort to give a debtor-in-possession some flexibility and breathing space. See H.R. Rep. No. 95-595, p. 340 (1977). We conclude that from the filing of a petition in bankruptcy until formal acceptance, the collective-bargaining agreement is not an enforceable contract within the meaning of NLRA § 8(d). Cf. *Allied Chemical Workers, supra*, at 187; *Dowd Box Co. v. Courtney*, 368 U.S. 502, 510-513 (1962). [Id. at 2815.]

Although the Respondent failed to file an answer to the complaint, the complaint discloses that on or about 13 September the United States Bankruptcy Court for the Western District of Pennsylvania designated Wally Electrical Supply Company, Debtor in Possession as debtor-in-possession of Wally Electrical Supply Company. Nothing before us, however, informs us when the Company filed the bankruptcy petition, whether the alleged violations occurred before or after the filing date, whether or when the Respondent formally accepted the collective-bargaining agreement after filing the petition, or whether the Bankruptcy Court permitted the rejection of the contract. Such information is critical in deciding whether the Respondent has violated the Act. Accordingly, in light of *Bildisco*, further investigation by the Regional Director into the circumstances surrounding the filing of the bankruptcy petition is necessary.² The General Counsel's Motion for Summary Judgment must

¹ All subsequent dates refer to 1983 unless otherwise indicated.

² See generally *Earle Equipment Co.*, 270 NLRB 827 (1984).

therefore be denied and the case remanded to the Regional Director.

ORDER

The General Counsel's Motion for Summary Judgment is denied, and the proceeding is remanded to the Regional Director for further investigation and consideration.